IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 284 of 2002

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL
AND
HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

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DEVKINANDAN BABULAL & ANOTHER - Appellants

Versus

STATE OF GUJARAT - Opponent

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Appearance :
MS BANNA S DUTTA for the Appellants.
THROUGH JAIL for the Appellants.
MR ND GOHIL, Additional Public Prosecutor for the Opponent.
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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 07/10/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE H.B.ANTANI)

1. Instant appeal preferred under Section 274 (2) of the Criminal Procedure Code is directed against judgment dated December 29, 2001 rendered by the Additional Sessions Judge,

Sabarkanta, at Himatnagar in NDPC Case No. 10 of 1999 whereby the learned Additional Sessions Judge has passed an order imposing sentence of RI for 10 years and fine of Rs. 1,00,000/- (Rupees One Lakh Only), in default imprisonment of 1 year for commission of offence under Section 15 of the NDPS Act against each appellant.

2. The short facts giving rise to the present appeal are as under:

Mr. L. K. Pranami, Police Inspector, LCB Himmatnagar, received information that some persons from Rajasthan are going to cross border and enter Gujarat with “poppy straw”. Therefore, he along with Mr. G.V. Padheria, Police Sub-Inspector, Anti-Dacoity Squad, Himmatnagar and other members of the LCB staff, including Assistant Head Constable Hirabhai Lalabhai; Assistant Head Constable Rameshbhai Mohanbhai; Additional Head Constable, Anti-Dacoity Squad, Himatnagar, Bhagwanbhai Khegarbhai; and Assistant Head Constable Bhikhalal Khusalbhai went to the Ratanpur check-post. Two *panch-witnesses* were also requisitioned. The first part of the *panchnama* was drawn at the Police Station itself.

The raiding party, after reaching the Ratanpur check-

post, were waiting for the arrival of the persons for whom the information was received by Mr. L. K. Pranami. As soon as two persons from Rajasthan side entered the border of Gujarat State, they were accosted by the raiding party. After introducing the members of the raiding party, both the persons were asked as to whether they would like to have the search of their persons in the presence of a Magistrate. When they declined the offer, the search of their persons was carried out by the raiding party in the presence of *panch-witnesses*.

One person gave his name as `Devkinandan Babulal Patidar' (appellant No. 1) residing at Mansore, Kanpur, Madhya Pradesh. He was having three white jute bags. Before carrying out the search of the bags, he was also specifically asked as to whether he was having pass or permit.

On opening the first jute bag, poppy straw was found therein. As the *muddamal* article was required to be weighed, Assistant Police Constable Bhikhabhai Khusalbhai was told to fetch a person for weighing *muddamal* article. He, therefore, summoned one businessman, namely, Ramanlal Kodarlal Patel. The weight of *muddamal*, on being weighed by Ramanlal Kodarlal, was found to be 10 Kgs and 700 Gms. Out

of the said *muddamal* article, poppy straw of 200 Gms was kept in a separate cloth bag. Thereafter, the cloth bag was tied with twine and sealed in the presence of *panch-witnesses* by applying the seal of *"Police Sub-Inspector, LCB, Himatnagar."* The remaining *muddamal* article was also kept in a separate cloth bag, tied with twine and sealed in the presence of *panch-witnesses*. The slips bearing signatures of the *panch-witnesses* and the concerned officer were also placed thereon.

On opening the second jute bag, poppy straw of 10 Kgs and 700 Gms was found. The procedure for weighing the same was carried out in presence of *panch-witnesses* and out of the aforesaid *muddamal* articles, 200 Gms was kept in a separate bag. Thereafter, the cloth bag was tied with twine and sealed in the presence of *panch-witnesses*. The seal of *"Police Sub-Inspector, LCB, Himatnagar"* was applied. The remaining *muddamal* was also kept in a separate bag and necessary sealing procedure, as per law, was carried out.

On opening the third bag, poppy straw of 10 Kg and 500 Gms was found. It was weighed in the presence of *panch-witnesses.* Out of the seized *muddamal*, 200 Gms was kept in a separate bag. Thereafter, the cloth bag was tied with twine and the seal of *"Police Sub-Inspector, LCB, Himatnagar"* was

affixed thereon in the presence of *panch-witnesses*. The remaining *muddamal* was also kept in a separate bag and the required sealing procedure, as per law, was carried out.

The other person who accompanied Devkinandan Babulal Patidar gave his name as 'Jagdish Sevaram Balai' (appellant No. 2), residing at Luhari, Taluka: Jhavra, District: Ratlam. He was having two bags and one white coloured bag.

On the search of the first bag, which was in his possession, poppy straw of 13 Kgs was recovered. It was weighed in the presence of *panch-witnesses*. Out of the said *muddamal*, 200 Gms was kept in a separate bag. Thereafter, the cloth bag was tied with twine and sealed by applying the seal of *"Police Sub-Inspector, LCB, Himatnagar"*. The remaining *muddamal* article was also kept in a separate bag and sealed in the presence of *panch-witnesses*.

Likewise, when the second bag was searched by the raiding party, poppy straw of 10 Kgs and 500 Gms was recovered. It was weighed in the presence of *panch-witnesses*. Out of the said *muddamal,* 200 Gms was kept in a separate bag. Thereafter, the cloth bag was tied with twine and the sealing procedure, as required by law, was carried out in the presence of *panch-witnesses*. The remaining

muddamal article was also kept in a separate bag and sealed, as per the requirement of the law. The seal of *"Police Sub-Inspector, LCB, Himatnagar"* was also affixed on both the seized articles, which were kept in separate bags.

On the search of third bag, poppy straw weighing 6 Kg and 400 Gms was recovered. The weighing of muddamal was carried out in the presence of *panch-witnesses.* Out of the said *muddamal* article, 200 Gms of poppy straw was kept in a separate bag. Thereafter, the cloth bag was tied with twine and same was sealed in presence of *panch-witnesses*. The seal of *"Police Sub-Inspector, LCB, Himatnagar"* was applied. The remaining *muddamal* article, which was recovered, was also sealed in the presence of *panch-witnesses* and the seal of *"Police Sub-Inspector, LCB, Himatnagar"*, was affixed thereon.

Thereafter, Mr. L. K. Pranami, Police Inspector, LCB, completed the second part of the *panchnama* at the spot and lodged the complaint, which was recorded. *Muddamal* article was handed over to Kantibhai Kodarbhai Dabhi along with the accused, complaint, etc. for the purpose of registering offence against the accused. Necessary entry in the station diary was also made by Kantibhai Kodarbhai Dabhi. *Muddamal,* which was sealed and kept in separate bags, was, thereafter,

sent to Forensic Science Laboratory (FSL) for the purpose of detailed analysis. The Investigating Officer recorded the statement of those persons who were conversant with the case. He obtained necessary report of analysis which indicated that the substances found from possession of the appellant and analysed was poppy straw. On completion of investigation, the appellants were charge sheeted in the Court of learned Additional Sessions Judge, Sabarkanta at Himatnagar, for commission of offence punishable under Section 15 of the NDPS Act. On the basis of the charge sheet submitted by the Investigating Agency, Sessions Case No. 10 of 1999 was registered.

3. The appellants were arrested and produced before the Special Additional Sessions Judge, Sabarkanta. The charge against the appellants was framed *vide* Exh. 24 for the offence punishable under Section 15 of the NDPS Act and the appellants pleaded not guilty to the said charge and claimed to be tried. The prosecution has, therefore, examined the following witnesses to prove its case against the appellants:

(i) PW 1, Lavjibhai Kanabhai Pranami, at Exh. 30;

(ii) PW 2, Chabilbhai Nathabhai Patel, at Exh. 37;

(iii) PW 3, Nanjibhai Jivaji, at Exh.51;

(iv) PW 4, Ramanlal Kodarlal Patel, at Exh. 55;

(v) PW 5, Shankarlal Nandaji Rathod, at Exh. 62;

(vi) PW 6, Sureshkumar Badrilal Rathod, at Exh. 63;

(vii) PW 7, Somasinh Kanaksinh Jala, at Exh. 64;

(viii) PW 8, Manaharsinh Shivsinh Solanki, at Exh. 66;

(ix) PW 9, Markant Kantilal Pathak, at Exh. 70;

(x) PW 10, Kantibhai Kodarbhai Dabhi, at Exh. 73; and

(xi) PW 11, Gambirsinh Vijsinh Paderia, at Exh. 77.

The prosecution has placed reliance on the following documentary evidence to prove its case against the appellants:

(i) letter of consent given for the search of the accused *vide* Exh. 31;

(ii) receipt of *muddamal* at Exh. 32;

(iii) information forwarded by Police Sub-Inspector, LCB, Himatnagar to the District Police Officer *vide* Exh. 33;

(iv) information with regard to offence given by Police Inspector, LCB, Himatnagar to District Police Officer, Himatnagar at Exh. 35;

(v) *panchnama* in respect of raid at Exh. 38;

(vi) the *panch* slips *vide* Exhs. 39 to 50;

(vii) the list of *muddamal* articles *vide* Exh. 65;

(viii) the letter written by Assistant Director, Narcotic Cell, Forensic Science Laboratory to Police

Inspector LCB Himatnagar *vide* Exh. 67;

(ix) report of the detailed analysis of FSL, at Exh. 72;

(x) the extracts of notings made which was sent to FSL *vide* Exh. 79;

(xi) the letter written to JMFC to add Section 27A and 29 of NDPS Act by Police Sub-Inspector, Himatnagar, *vide* Exh. 80; and,

(xiii) complaint given by Mr. L. K. Pranami *vide* Exh. 88.

4. At the conclusion of trial, further statement of the appellants was recorded under Section 313 of the Criminal Procedure Code, 1973. The appellants were explained the evidence and the circumstances against them. The appellant No. 1 has pleaded that a false case was foisted on him and when he was proceeding in a bus for the purpose of doing his personal work, he was arrested and falsely implicated in the case. The appellant No. 2 pleaded before the Additional Sessions Judge that a false case has been foisted on him and he is absolutely innocent.

5. On appreciation of the entire gamut of oral deposition and the documentary evidence, the learned Additional Sessions Judge, held that as the prosecution has proved its case against the appellants by adducing cogent and

convincing evidence, the appellants are liable to be punished for the offence under Section 15 of the NDPS Act and each appellant is imposed sentence of RI for 10 years and fine of Rs. 1,00,000/- (Rupees One Lakh Only); in default RI for 1 year. It is held by the learned Additional Sessions Judge that the mandatory provisions contained in Sections 42 and 50 have been complied with by the prosecution and the prosecution has proved the case against the appellants in a conclusive manner. After going through the entire documentary evidence and the oral deposition adduced by the prosecution, the learned Additional Sessions Judge passed the order of sentence against the appellants, as mentioned hereinabove, under Section 15 of the NDPS Act, giving rise to the present appeal.

6. This Court has heard Ms. Banna S. Dutta, learned Advocate for the appellants and Mr. N. D. Gohil, learned Additional Public Prosecutor for the State of Gujarat, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case as well as the entire evidence on record with reference to broad and reasonable probabilities of the case.

7. The learned Advocate representing the appellants

submitted that on perusal of the testimony of raiding officer Mr. Lavji Kanabhai Pranami, who has been examined by Exh. 30, it is not indicated in his deposition that the contraband article “poppy straw” was seized from the possession of the appellant No. 2 and, therefore, the prosecution has miserably failed to prove the possession of contraband article from the appellant No. 2 and the benefit of same is required to be given to the appellants. The argument is based on the basis of deposition adduced by Mr. Lavaji Kanabhai Pranami and produced in the paperbook where some portion is missing wherein the seizure from the appellant No. 2 is not mentioned. However, on perusal of the deposition adduced by Mr. Lavaji Kanabhai Pranami *vide* Exh. 30 from original papers, it is evident that the appellant No. 2 was, in fact, found in possession of contraband article and that fact is reflected in his original deposition, which is produced in the present case. Thus, the argument canvassed by learned pleader on behalf of the appellants is without any substance, as both the appellant Nos. 1 and 2 were, in fact, found in possession of contraband articles. Further, the deposition adduced by Mr. Lavji Kanabhai Pranami gets necessary corroboration from even the complaint *vide* Exh. 88 and *panchnama* produced at Exh. 38 to the present case.

The learned Advocate's submission, that the mandatory provisions contained in Section 42 (2) of NDPS Act has not been complied with and as there is non-compliance of the said provisions, the appellants are liable to be acquitted, is stated to be rejected. A bare perusal of Section 42 makes it clear that when search is required to be carried out of a particular thing kept or concealed in any building, conveyance or enclosed place, then the provisions contained in Section 42 can be invoked. Admittedly, in the facts and circumstances of the case, the bags, which were in possession of appellant Nos. 1 and 2, were searched, and, therefore, the provisions contained in Section 42 would, in our view, cannot be attracted. In view of the decisions of the Supreme Court in: (1) **Rajendra And Another Vs. State of M.P., (2004) 1 SCC 432**; (2) **Krishna Kanwar (Smt.) alias Thakuraeen Vs. State of Rajasthan, (2004) 2 SCC 608**; and, (3) **State of Haryana Vs. Jarnail Singh and Others, (2004) 5 SCC 188,** the provisions of Section 42 cannot be made applicable to the facts and circumstances of the present case and the contention, thus, raised by the learned Advocate is without any merits and it cannot be accepted.

The learned Advocate submitted that the provisions contained in Section 50 of NDPS Act is also not scrupulously followed by the raiding party while conducting the raid and

in searching the persons of the appellants. The aforesaid contentions is devoid of merit in view of the recent decision rendered by the Apex Court in the case of **State of H. P. Vs. Pawan Kumar** and reported in **(2005) 4 SCC 350** In the facts and circumstances of the present case, the search of the bags carried by the appellants was required to be carried out by the raiding party and it was not a search of the person of the appellants and, therefore, the provisions contained in Section 50 would have no applicability. Even if we peruse the deposition adduced by the prosecution at Exh. 30 by Mr. Lavji Kanabhai Pranami, along with contemporary documents, such as, complaint at Exh. 88 and *panchnama* at Exh. 38, then it makes it clear that the appellants were given the opportunity to have search of their persons in the presence of a Magistrate and the same has been reflected in the complaint produced by the prosecution as well as in the *panchnama* at Exh. 38 to the present case.

Save and except the above mentioned contentions, no other contention has been raised by the learned Advocate on behalf of the appellants.

In view of the above facts and circumstances of the

case, as the learned Advocate on behalf of the appellants has miserably failed to dislodge the prosecution case, and judgment rendered by Additional Sessions Judge in the present case, in our view, requires to be upheld.

8. For the foregoing reasons, the appeal preferred by the appellants fails and we hereby confirm the judgment and order dated December 29, 2001 rendered by the learned Additional Sessions Judge, Sabarkanta at Himatnagar, in NDPS Case No. 10 of 1999. *Muddamal* article be disposed of in terms of the order passed by the learned Trial Judge.

[J. M. PANCHAL, J.] **[H. B. ANTANI, J.]**

/shamnath